

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 18, 2009

STATE OF TENNESSEE v. BRUCE WAYNE CRENSHAW

Direct Appeal from the Criminal Court for Davidson County
No. 2007-C-2244 Cheryl A. Blackburn, Judge

No. M2008-00177-CCA-R3-CD - Filed August 13, 2009

A Davidson County jury found the Defendant, Bruce Wayne Crenshaw, guilty of aggravated assault by causing extremely offensive or provocative physical contact with the victim, thereby causing serious bodily injury to the victim. The trial court sentenced him to serve five years of incarceration and to pay \$2641.19 in restitution. The Defendant now appeals, and he claims: (1) the indictment charges the Defendant with a form of aggravated assault that does not exist under Tennessee case law; (2) the trial court erred when it did not instruct the jury on assault by causing bodily injury to the victim as a lesser-included offense; and (3) the trial court erred when it sentenced him to serve five years in the Tennessee Department of Correction. After a thorough review of the record and the applicable law, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Kristen Neff and Mary-Katheryn Harcombe (at trial) and Emma Rae Tennent (on appeal), Nashville, Tennessee, for the Appellant, Bruce Wayne Crenshaw.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Procedural History

A Davidson County grand jury issued an indictment on March 22, 2007, charging the Defendant with aggravated assault. This indictment read:

THE GRAND JURORS of Davidson County, Tennessee . . . present that:
[the Defendant] . . . on the 28th day of January, 2006, in Davidson County, Tennessee . . . intentionally or knowingly did cause serious bodily injury to Brandon Burchett, in violation of Tennessee Code Annotated § 39-13-102

The Defendant pled not guilty at his arraignment, and, on August 17, 2007, a superceding indictment was filed that charged the Defendant with aggravated assault. The superceding indictment read:

THE GRAND JURORS of Davidson County, Tennessee . . . present that
[the Defendant] . . . on the 28th day of January, 2006, in Davidson County, Tennessee [i]ntentionally or knowingly did cause physical contact with Brandon Burchett and a reasonable person would regard the contact as extremely offensive or provocative, and did thereby cause serious bodily injury to Brandon Burchett, in violation of Tennessee Code Annotated § 39-13-102

The Defendant was tried on this charge by a Davidson County jury.

B. Trial

At trial, the following evidence was presented: Brandon Curtis Stewart testified that between the late hours of January 27, 2006, and the early hours of January 28, 2006, he was at a karaoke bar in Nashville with Brandon Burchett and Burchett's girlfriend, Marcie Stark. They went to the back of the bar to meet some friends, where Stewart had one or two beers; the victim, Burchett, had one beer; and Stark did not have any. Around 1:00 or 1:30 a.m., they decided to leave their friends and left the bar via the back door.

As soon as they exited the bar and stood on the bar's landing, the Defendant grabbed the victim's arm and confronted him, saying "I heard you were talking about my boy, Phillip." Stewart said he did not know the Defendant and had not seen him at the bar before this incident. Stewart said that both he and the victim told the Defendant they did not know anyone named Phillip. Stewart testified that he saw a fist come from behind the Defendant and strike the victim in the side of his head. He remembered at least three other people standing behind the Defendant, and these people encouraged the Defendant by saying things like "hit him" and "you can take him." Stewart said he was "ninety-five percent sure" that the Defendant did not throw the initial punch.

Stewart testified that as a result of being punched, the victim fell down the stairs to the second landing. Stewart said the victim tried to stand but was on the ground being hit and kicked by three or four other men. Stewart saw the Defendant punch, knee, and kick the victim mainly on the victim's face. The other men joined in hitting and kicking the victim after the Defendant hit the victim. At some point, Stewart pulled the Defendant off the victim and threw

the Defendant down the other flight of stairs. After this, the Defendant never returned to the fight. Eventually, Stewart helped the victim up, and he, the victim, and Stark ran to Stewart's car.

Upon arriving home, Stewart helped clean the victim, and the victim went to bed. Stewart stated that he knew the victim went to the hospital during the night.

On cross-examination, Stewart testified that he, Stark, and the victim all fell down the stairs after the first punch to the victim. When the group of men began hitting the victim, Stark hit them with her purse.

The victim, Brandon Burchett, a twenty-two year old student at Western Kentucky University, testified that on January 28, 2006, he was at a bar in Nashville with Stewart and Stark. He said they got to the bar, met some people, and had appetizers and beer. They exited the bar through the back door, and the victim said that, as soon as he left the bar, the Defendant said to him, "I heard you been talking shit about my boy, Phillip." The victim said he did not know the Defendant or anyone named Phillip, which he told the Defendant. The Defendant said that was not what he had heard. At this point, the Defendant and the victim were standing "nose to nose." The victim said, "[T]he next thing I kn[e]w I got hit from the right side, knocked down the staircase, and that's when [the Defendant] followed me down." The victim recalled that the Defendant initially punched him, and when he stopped, about four other men began hitting him. The victim said he was "kicked in the ribs, kicked in the face, stomped in the face" and was "kicked against the walls." He said he was never able to get on his feet to defend himself.

After Stewart got the victim home, the victim showered and called his mother, who told him to go to the emergency room. The victim said that his face, ribs, and torso all hurt. He had two fractures in his orbital floor, a fracture in his cheek, and his nose was shattered. He rated the pain as a ten on a scale of one to ten, and he described that he felt like he had been hit by a truck. The hospital bandaged the victim and gave him ointments and pain pills. The victim had surgery one-and-a-half months later. The victim recalled that he did not know who attacked him, but he found the Defendant's face and name from old high school yearbooks.

On cross-examination, the victim testified that he landed on his feet after he fell down the stairs. He recalled that Stark was there, and she was hitting the Defendant with the victim's hat. The victim admitted that he drank alcohol at the bar that night while he was only twenty years old. The victim recalled that the fight lasted between twenty and thirty seconds. The victim remembered that the Defendant threw multiple punches.

Marcie Stark, a twenty year old student at Volunteer State, testified that she went to the karaoke bar with Stewart and the victim. They met some friends at the bar, and she did not see Stewart or the victim get into an argument with anyone. On her way out, she stopped to talk to a high school friend, and she was on the stairwell "when the two boys started to harass [the victim]." The Defendant accused the victim of talking about a man named "Phillip," and the victim denied knowing "Phillip." Stark said she also did not know who "Phillip" might be. Stark remembered a punch coming from the side and knocking the victim backwards down the

stairs. She could not see who actually threw the punch. She saw the Defendant and a few other men punching and kicking the victim. Stark tried hitting them with the victim's hat to get them to stop. Once Stewart safely removed the victim from the fray, they ran to Stewart's car and went home. Stark testified that she went with the victim to the hospital that morning.

On cross-examination, Stark said she was eighteen years old at the time, and she probably had one drink before going to the bar.

Dr. Robert Cowden, an ear, nose, and throat doctor who also specializes in head and neck surgery, testified that he treated the victim on February 1, 2006. The emergency room referred the victim to his office for facial trauma. Dr. Cowden said the victim had a fractured nose, left mid-face fractures, and a fracture involving the left eye socket. Dr. Cowden performed surgery on the victim on March 30, 2006, to straighten the wall in the center of the victim's nose so he could breathe more easily. He did not reshape the external part of the Defendant's nose. Dr. Cowden said that the injuries would have been "very painful" and that the victim told him the injuries were indeed very painful. On cross-examination, Dr. Cowden said the victim still complains of permanent numbness on the left side of his face.

After hearing the evidence presented, the jury convicted the Defendant of the indicted offense, aggravated assault.

C. Sentencing Hearing

At the sentencing hearing, the following evidence was presented: the victim testified that he had to undergo nasal reconstructive surgery and that he had to pay \$2641.19 in medical bills due to the incident.

Elizabeth Ann Crenshaw, the Defendant's mother, testified that she would support the Defendant if he was placed on probation. She said that the Defendant had a job waiting for him and that she would transport the Defendant to and from his job. She testified that she would also help the Defendant get drug addiction treatment. Finally, Ms. Crenshaw pointed out that the Defendant's sisters and his father were present for his sentencing hearing.

The Defendant testified that he wanted to be on probation so he could work to pay restitution to the victim. He also wanted to enter a drug and alcohol treatment program so he could "get [his] life straight." He said he acted out of stupidity and fear. He also said he was around the wrong people at the time of the offense. The Defendant admitted he was jailed a few months before the sentencing hearing because of a reckless driving probation violation.

On cross-examination, the Defendant pointed out that he turned himself into authorities as soon as he realized he missed his court date for another offense. He also apologized for beating the victim and acknowledged that his actions were unwarranted.

After hearing the evidence presented, the trial court sentenced the Defendant to serve five years of incarceration and pay \$2641.19 in restitution to the victim. The Defendant now appeals from this judgment.

II. Analysis

On appeal, the Defendant contends: (1) the indictment charges the Defendant with a form of aggravated assault that does not exist under Tennessee case law; (2) the trial court erred when it did not instruct the jury on assault by causing bodily injury to the victim as a lesser-included offense; and (3) the trial court erred when it sentenced him to serve five years of incarceration.

A. Sufficiency of the Evidence

On appeal, the Defendant contends that the evidence is insufficient to sustain his conviction. As part of his claim, the Defendant argues that, because case law holds that injuries are not included in the term “physical contact” of the offensive or provocative contact prong of the assault statute, the crime of aggravated assault by an extremely offensive or provocative contact that caused serious bodily injury does not exist. The State counters that the Defendant cannot challenge an indictment for the first time on appeal. Moreover, it claims that the indictment language did not differ substantially from the proof supporting the conviction, so the conviction is sufficiently supported by the evidence.

1. Challenge to the Indictment

We first must address whether the Defendant can challenge the indictment for the first time on appeal. Rule 12(b)(2)(B) of the Tennessee Rules of Criminal Procedure sets out that, generally, a motion alleging a defect in the indictment must be raised before trial. However, a motion alleging that the indictment fails to charge an offense may be heard at any time. Tenn. R. Crim. P. 12(b)(2)(B). The Defendant is alleging that the indictment fails to charge an offense that exists under Tennessee case law. Therefore, in our view, the Defendant is not precluded from raising this issue for the first time on appeal, and we will address the issue on its merits.

Specifically, the superceding indictment charges that the Defendant “intentionally or knowingly did cause physical contact with [the victim] and a reasonable person would regard the contact as extremely offensive or provocative, and did thereby cause serious bodily injury to [the victim] in violation of Tennessee Code Annotated § 39-13-102” The Defendant quotes *State v. Smiley*, 38 S.W.3d 521, 525 (Tenn. 2001) (citing T.C.A. § 39-13-101(a)(3) Sentencing Comm’n Cmts.), which states, “The sentencing commission comments show that [the definition of assault based on extremely offensive or provocative physical contact] applies only to that physical contact which does not involve physical bodily injury.” Thus, the Defendant concludes, his indictment charges an offense that does not exist because an aggravated assault based upon extremely offensive or provocative physical contact (involving no physical bodily injury according to *Smiley*) may not also contain an element of serious bodily injury. The State responds that the indictment’s language merely expands the theory of the State’s case.

“Generally stated, an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy.” *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997) (citations omitted). Additionally, an indictment must state the facts of the offense in an ordinary and concise language “in such a manner as to enable a person of common understanding to know what is intended.” T.C.A. § 40-13-202 (2003).

We conclude that the indictment is not defective and that it alleges a proper offense. The statutory definition of aggravated assault is an assault, as defined in the Tennessee Code Annotated section 39-13-101(a), coupled with serious bodily injury. The indictment takes the “serious bodily injury” element from the aggravated assault statute and combines it with the “extremely offensive or provocative” prong of the assault statute. *See* T.C.A. §§ 39-13-101(a)(3), -102(a)(1) (2003). One form of assault, as defined in Tennessee Code Annotated section 39-13-101(a) is by intentionally or knowingly causing physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. Therefore, the plain language of the aggravated assault statute provides for the crime of aggravated assault as charged in the indictment. Moreover, the indictment cited the statute for aggravated assault, and it notified the Defendant of the offense with which he was charged. *See Sledge*, 15 S.W.3d at 94; *see also Hammonds*, 30 S.W.3d at 300. *Smiley* does not directly address the issue of whether aggravated assault can consist of “extremely offensive or provocative” contact, causing “serious bodily injury” to a victim, as was alleged in the indictment here. Instead, *Smiley* addresses the issue of whether assault by an extremely offensive or provocative contact is a lesser-included offense of assault by causing bodily injury. *See Smiley*, 38 S.W.3d at 525; *see also* T.C.A. § 39-13-101. For the foregoing reasons, we conclude that the indictment was sufficient and properly alleged that the Defendant committed the offense of aggravated assault.

2. Sufficiency of the Evidence Analysis

Having concluded the indictment was sufficient, we turn now to determine whether the evidence presented was sufficient to support the Defendant’s conviction for aggravated assault. When an accused challenges the sufficiency of the evidence, this Court’s standard of review is whether, after considering the evidence in the light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone.” *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and “[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). “Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant was convicted of aggravated assault. Aggravated assault occurs when a defendant intentionally or knowingly commits an assault, as defined in Tennessee Code Annotated section 39-13-101, and causes serious bodily injury to a victim. T.C.A. § 39-13-102(a)(1). One form of assault is when a defendant “intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.” T.C.A. § 39-13-101(a)(3). “‘Intentional’ refers to a person who acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” T.C.A. § 39-11-302(a) (2003). “‘Knowing’ refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.” T.C.A. § 39-11-302(b). Put another way, “[a] person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.” T.C.A. § 39-11-302(b). As our Supreme Court pointed out in *Smiley*, “extremely offensive” and “provocative” are not statutorily defined. 38 S.W.3d at 525. Accordingly, the Court referred to tort law examples of such conduct, and it instructed that “kissing without one’s consent, cutting one’s hair without consent, or spitting in

one's face" could constitute "extremely offensive or provocative" physical contact in the criminal law realm. *Id.* (citations omitted).

Considering the evidence in the light most favorable to the State, we conclude the evidence supports the Defendant's conviction for aggravated assault. The Defendant grabbed the victim's arm and stood "nose to nose" with the victim and accused him of speaking unfavorably about a man named "Phillip." After the victim denied knowing anything about "Phillip," someone punched the victim, causing him to fall down the stairs. The Defendant then punched, kicked, and kneed the victim's head. The victim suffered multiple broken facial bones and underwent surgical reconstruction of his nose. The Defendant's grabbing the victim's arm and argumentatively questioning him while in a close physical proximity ("nose to nose") is sufficient evidence of extremely offensive or provocative physical contact. *See Smiley*, 38 S.W.3d at 525. Also, the Defendant's extremely offensive or provocative physical contact with the victim led immediately to the victim being physically beaten by the Defendant and his friends. The physical beating caused serious bodily injury to the victim, to the point that the victim required facial surgery to repair broken facial bones. The evidence is sufficient to support the Defendant's conviction for aggravated assault, and he is not entitled to relief on this issue.

B. Jury Instruction on Assault by Causing Bodily Injury as a Lesser-Included Offense

The Defendant next contends that the trial court erred when it failed to instruct the jury on "simple assault" as a lesser-included offense. The State argues that "simple assault" is not a lesser-included offense of aggravated assault by extremely offensive or provocative physical contact. While there is no crime presently titled "simple assault," we understand both parties to be referring to assault by intentionally, knowingly, or recklessly causing bodily injury to another. *See* T.C.A. § 39-13-101(a)(1).

The question of whether a given offense should be submitted to the jury as a lesser-included offense is a mixed question of law and fact. *Smiley*, 38 S.W.3d at 524 (citing *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999)). The standard of review for mixed questions of law and fact is de novo with no presumption of correctness. *Id.* The trial court has a duty "to give a complete charge of the law applicable to the facts of the case." *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986)); *see* Tenn. R. Crim. P. 30.

A Defendant has a "right to have the jury instructed on all lesser-included offenses supported by the evidence." *State v. Page*, 184 S.W.3d 223, 229 (Tenn. 2006). In *State v. Burns*, our Supreme Court enunciated what constitutes a lesser-included offense:

An offense is a lesser-included offense if:

- (a) all of its statutory elements are included within the statutory elements of the offense charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or

(3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

6 S.W.3d 453, 466-67 (Tenn. 1999). If an offense is a lesser-included offense under the *Burns* analysis, then the trial court must conduct the following two-step analysis in order to determine if the lesser-included offense instruction should be given:

First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

Id. at 469.

If a trial court improperly omitted a lesser-included offense instruction, then constitutional harmless error analysis applies. “An error affecting a constitutional right is presumed to be reversible, and any such error will result in reversal of the conviction unless the State proves beyond a reasonable doubt that the error did not affect the outcome of the trial.” *State v. Ely*, 48 S.W.3d 710, 725 (Tenn. 2001) (citing *State v. Harris*, 989 S.W.2d 307,315 (Tenn. 1999)). Our Supreme Court has instructed that “[i]n making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence

presented at trial, the defendant's theory of defense, and the verdict returned by the jury." *State v. Allen*, 69 S.W.3d 181, 191 (Tenn. 2002).

As defined by the Legislature, one definition of aggravated assault is when a person:

- (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and:
 - (A) Causes serious bodily injury to another; or
 - (B) Uses or displays a deadly weapon.

T.C.A. § 39-13-102(a)(1). Tennessee Code Annotated section 39-13-101, as referenced in the aggravated assault statute, defines assault as follows:

- (a) A person commits assault who:
 - (1) Intentionally, knowingly or recklessly causes bodily injury to another;
 - (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
 - (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

T.C.A. § 39-13-101(a).

The trial court in this case instructed the jury on aggravated assault, facilitation of aggravated assault, attempted aggravated assault, facilitation of attempted aggravated assault, and assault by offensive or provocative contact. The Defendant requested an instruction on assault by causing bodily injury as a lesser-included offense of the indicted charge of aggravated assault. When reviewing the Defendant's request, the trial court concluded that assault by causing bodily injury required an additional element from the indicted offense:

Now, with regard to your request for the lesser-included offense of simple assault where it says that, "Intentionally, knowingly, or recklessly causes bodily injury to another," don't we get into the same mess? And, that is, that assault is a result-oriented crime. In other words, you have to have the intent to cause the result, which is different than the one that he's currently charged with, that you only have to know or are aware that your conduct – it's a conduct-oriented crime. So to be a lesser-included it's adding an element that is not there for the lesser-included of the intentional or the offensive conduct. So your request for the lesser of simple assault requires an additional element, does it not?

The trial court then concluded that assault by causing bodily injury was not a lesser-included offense of aggravated assault by extremely offensive or provocative physical contact:

I'm not going to charge that lesser-included of simple assault because of the added requirement that you know that you're going to cause the bodily injury, which is not what [the Defendant] was indicted on.

After a careful and thorough review, we conclude that the trial court erred by not instructing the jury on assault by bodily injury as a lesser-included offense. We begin with the proposition that the mental state of “intentional, knowing, or reckless” is included in the mental states of “intentional or knowing”, since “reckless” is a lesser mental state of intentional and knowing. *State v. Rush*, 50 S.W.3d 424, 430-31 (Tenn. 2001) (“Because lesser levels of the statutory hierarchy of mental states (intentional, knowing, reckless, and criminally negligent) are included within the greater levels . . . an intent element which differs from the intent element of the charged offense only by one of these lower-hierarchy mental states is not actually treated as a differing element.” *Citing* T.C.A. § 39-11-301(a)(1) (2006)). With that understanding, every element of assault by bodily injury is included in the charged offense, aggravated assault defined as serious bodily injury caused by intentionally or knowingly having physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. *See Burns*, 6 S.W.3d at 466-67. Assault by bodily injury consists of the elements that the actor (1) intentionally, knowingly, or recklessly (2) caused bodily injury to another. Given that “reckless” is a lesser mental state than “intentional” and “knowing”, those elements are wholly within the elements of the charged offense where an actor (1) intentionally or knowingly, (2) causes serious bodily injury to another, and (3) causes that injury by a physical contact that a reasonable person would regard as extremely offensive or provocative. T.C.A. § 39-13-101, -102. Thus, assault by bodily injury is a lesser-included offense of the charged offense. *Burns*, 6 S.W.3d at 466-67.

Our inquiry, though, does not end there. Having decided that the trial court improperly omitted a lesser-included offense instruction, we must determine whether the State proves beyond a reasonable doubt that the error did not affect the outcome of the trial. *Ely*, 48 S.W.3d at 725. Given the record, the evidence presented at trial, the defendant’s theory of defense, and the verdict returned by the jury, we conclude beyond a reasonable doubt that the error did not affect the outcome of the trial. *See Allen*, 69 S.W.3d at 191. The victim’s injuries, which included a fractured nose, left mid-face fractures, and a fractured left eye socket, were so severe that reconstructive facial surgery was required. Given the severe nature of the victim’s bodily injuries and the testimony implicating the Defendant in causing the victim’s serious bodily injuries, we fail to see how the omission of a jury instruction on assault by bodily injury would have affected the outcome of the trial. The Defendant is not entitled to relief on this issue.

C. Sentencing

The Defendant contends that the trial court erred when it sentenced him to serve five years. Specifically, he argues that the trial court should have considered the Defendant’s family support and his remorsefulness for his crime. The State counters that the trial court properly sentenced the Defendant.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing

Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). Specific to the review of the trial court's finding enhancement and mitigating factors, "the 2005 amendments deleted as grounds for appeal a claim that the trial court did not weigh properly the enhancement and mitigating factors." *State v. Carter*, 254 S.W.3d 335, 344 (Tenn. 2008). The Tennessee Supreme Court continued, "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the nature and characteristics of the offense, (5) any mitigating or enhancement factors, (6) the information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statements made by the defendant on his or her own behalf. See T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

Our Tennessee Legislature has enumerated twelve factors that, when proven by the evidence, may mitigate a defendant's sentence. T.C.A. § 40-35-113 (2003). After it listed those specific twelve factors, it provided a "catch-all" factor, which states that the trial judge may consider "[a]ny other factor consistent with the purposes of this chapter," as described in an earlier section. T.C.A. § 40-35-113; see T.C.A. § 40-35-102 (2003).

When sentencing the Defendant, the trial court acknowledged that the State cited five enhancement factors, and it addressed each factor:

[The Defendant] has a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. In addition – now, these are – you know, it's not felonies, but he does have reckless endangerments and he's failed to appear. He also was positive for cocaine. So that was something I can consider. He was the leader in the commission of an offense involving two or more criminal actors. That is clearly made out by the testimony at trial.

Factor number seven is cited by the State, that is, it involved a victim and was committed to gratify the defendant's desire for pleasure or excitement. I don't necessarily find that in the record, so I'm not going to find factor number seven.

Factor number eight does apply, that he has failed to comply with conditions of a sentence involving release into the community previously. And that was his violation for probation for – as he indicated was for not reporting.

And factor number thirteen applies. And that is he was on release for probation at this time. So there are four factors.

The trial court then considered the applicable mitigating factors:

Looking at mitigating factors I really don't see any except for basically what we call the catchall factor, thirteen, which is any other factor consistent with the purpose of this chapter. And I'll have to consider the fact that he didn't have to but he came to court when he was released accidentally. So that is something in his favor.

The Defendant was convicted of aggravated assault, which is a Class C felony. T.C.A. § 39-13-102(d)(1). The Defendant was a Standard, Range I offender, therefore his statutory range is three to six years. T.C.A. § 40-35-112(a)(3) (2003). The trial court sentenced the Defendant to five years, which is within the statutory range for his offense. The trial court considered the applicable enhancement and mitigating factors, and it sentenced the Defendant in a manner consistent with the sentencing purposes and principles. *See Carter*, 254 S.W.3d at 344. We conclude there was no error in the trial court's sentencing of the Defendant. The Defendant is not entitled to relief on this issue.

III. Conclusion

We conclude that: (1) the indictment charged the Defendant with a form of aggravated assault that does exist under Tennessee case law; (2) the trial court erroneously failed to instruct the jury on assault by causing bodily injury as a lesser-included offense of the offense charged, however, the error was harmless; and (3) the trial court properly sentenced the Defendant. In accordance with the foregoing reasoning and authorities, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE